DISSENT BY CIRCUIT JUDGE POLLACK, IN PLACE OF MOON, C.J., RECUSED, IN WHICH ACOBA, J., JOINS

With all due respect, I dissent to the majority's rejection of the Application for Writ of Certiorari filed by Petitioner/Defendant-Appellant Michael Makana Hoe (Petitioner), and for the reasons set forth below, would accept Petitioner's Application.

I.

The Trial Court Applied an Erroneous Definition of Consume in Ruling Upon the Motion for Judgment of Acquittal and in Making Its Final Determination of Guilt.

The Complaint in this case alleged that Petitioner, "being under twenty-one years of age, did consume liquor." In reviewing the record of this case, it is quite apparent that the meaning of the word "consume" was misapprehended by the district court of the second circuit (the court). This error may have been predicated upon the prosecutor's arguments to the court as to the meaning of this term. Although there was no evidence that Petitioner had ingested alcohol on school grounds, the prosecutor repeatedly contended that alcohol had been "consumed" at the school and that was where the violation had occurred. In arguing against Petitioner's motion for judgment of acquittal made after the State rested, the prosecutor stated as follows:

> Second, regarding venue. Officer Terry did testify as to the venue, and that it was in the division of Wailuku, County of Maui, State of Hawaii, and that the high school was there and that these events took place there and that the violation took place there.

(Emphasis added.) The prosecutor further argued as follows, in opposing Petitioner's renewed motion for judgment of acquittal:

> However, in any case, certainly there is, from the evidence that the State has presented on the record, it is

> clear that the Defendant was – had consumed alcohol at the school at an assembly and was not engaged in business, was not an undercover buyer of alcohol, and/or basically anything else for this.
>
> . . . .
>
> In this case, the minor was – or the defendant had consumed liquor and he was at a public school. And there are – religious ceremonies are not permitted at public schools.

(Emphases added.)

The premise for the prosecutor's argument that consumption had occurred at the high school was based upon the prosecutor's assertion that Petitioner was "metabolizing" the alcohol while at the school, and the metabolizing process was part of "consumption."

> However, the evidence does indicate that, indeed, the defendant was still metabolizing the alcohol and metabolization of alcohol would be part of consumption under the dictionary definition of consumption, that is, certainly to consume means to process, as well. And he was still processing that alcohol at his school.

(Emphasis added.)

The court integrated the prosecutor's arguments into its ruling in denying the motion for judgment of acquittal when it found that the religious ceremony defense was not applicable because there was no evidence that a religious activity had occurred during the school assembly.

> THE COURT: Again, as the Court has indicated, paragraphs (1) and (3) do not apply. Paragraph (2), there is no indication. And as the State has argued, religious activity during this assembly, one there is no evidence and, two, would not be appropriate – I should say "religious ceremony".
>
> Therefore, the Court is, again, overruling the – or denying the motion for judgment of acquittal.

(Emphasis added.)

The prosecutor reiterated its "metabolizing" definition of consumption in its closing argument, and the court again incorporated this meaning of consumption in its ultimate finding

of guilt when it again applied the religious ceremony exception to the school location.

> [PROSECUTOR]: . . . [B]ut this was corroborated by the intoxicating effects of having actually consumed and metabolized – and being in the process of metabolizing this alcohol.
>
> And so, on that basis, the State believes that it has proven this case beyond a reasonable doubt. And, indeed, that the defendant is under 21 years of age.
>
> . . . .
>
> THE COURT: First, there was no – this was a school, a high school assembly held at the Maui High School. There was no religious assembly going on, and such a thing would certainly be in contrast to use of public – public places, such as a school.
>
> And, moreover, again, the level of the smell that has been indicated here is number six, seven, or eight, from six to eight, which is a fairly strong smell of liquor that has been testified to by all parties involved. And so, for that reason, the [c]ourt will find that the State has disproved that element – or, I'm sorry, I should say that subsection of Subsection (2) of 281-101.5.
>
> Okay. So the [c]ourt, again, will find the State has proven its case beyond a reasonable doubt.

(Emphasis added.)

Accordingly, the court did not employ the appropriate legal analysis in evaluating the evidence in this case as it applied a definition of "consume" that has been broadly rejected by other jurisdictions.

II.

In Light of the Trial Court's Misinterpretation of The Term "Consume" and the Large Number of Appellate Decisions in Other Jurisdictions That Have Addressed the Meaning of This Term, This Court Should Provide Appropriate Guidance to the Trial Courts.

The ICA's conclusion in its Opinion was as follows:

> We conclude that there was substantial evidence to show that Hoe had consumed liquor and to support Hoe's conviction. See State v. Lawson, 681 P.2d 867, 870 (Wash. Ct. App. 1984) (holding that evidence that a police officer "could smell alcohol on [the defendant's] breath from a distance of two feet; that [the defendant's] words were somewhat unclear and lacked sense; and that [the defendant's] physical actions were not steady or sure" was sufficient to prove that the defendant had consumed alcohol).

State v. Hoe, 122 Hawai‘i 347, 350, 226 P.3d 517, 520 (App. 2010) (emphasis added).

Two years after Lawson was decided, the Washington Supreme Court in State v. Hornaday, 713 P.2d 71, 76 (Wash. 1986), held that to “consume” liquor “is to drink liquor; in contrast, ‘consumed’ implies that the liquor has already been drunk.” Since the officer in that case did not see the defendant drinking anything, the officer did not observe the defendant "consume" liquor. That court then rejected the “metabolizing” argument:

> When we apply this reasoning to the terms "consume" and "possession" found in RCW 66.44.270, we are persuaded that these terms do not include the stage at which the liquor has already been swallowed but is still being assimilated by the body. RCW 66.44.270 and RCW 10.31.100 should be read together and both given effect. The strict interpretation of "possession" and "consume" does accommodate a meaning for both words by which the statutes complement each other.

Id. at 128-29 (emphasis added).

Importantly, the Hornaday court was concerned by the inconsistency that would be present if consumed alcohol included the already ingested stage whereas possession of a drug would not. Several other more recent Washington appellate cases have followed Hornaday.

The ambiguity inherent in the word “consume” has been observed by a multitude of courts.

> We conclude that the terms "consume" and "possess" are ambiguous as used in the "minor in possession" statute because they can be interpreted in more than one manner. Specifically, they can be construed narrowly to mean only physical control and ingestion, as defendant urges, or very broadly to mean metabolism and containment in the body, as proposed by the prosecutor. A provision is considered ambiguous when it is susceptible to more than one reasonable interpretation.

State v. Rutledge, 645 N.W.2d 333, 336 (Mich. Ct. App. 2002) (emphasis added) (citation omitted).

Many states have sought to limit an expansive definition of "consume" so as to provide consistency with drug laws or other related laws in their jurisdiction. The Utah Court of Appeals conducted an exhaustive analysis of statutes and cases from jurisdictions across the county.

> Statutes from other states support a narrow definition of the term "consumption." Michigan's impaired driving statute defines "consumed" as "to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body." Mich. Comp. Laws. § 768.37(3)(b) (2004). Oregon defines "ingest" as "to consume or otherwise deliver a controlled substance into the body of a person." Or. Rev. Stat. § 475.984(3)(c) (2003). And Texas defines "human consumption" as "the injection, inhalation, ingestion, or application of a substance to or into the body." Tex. Health & Safety Code Ann. § 481.002(21) (2004). The State, on the other hand, cites no statutes in support of their position that "consumption" is defined as including metabolization. Thus, we are unpersuaded that our legislature intended "consumption" under section 58-37-2(1)(dd) to include metabolization of controlled substances.
>
> In addition, caselaw from this state and others supports this interpretation. In State v. Sorenson, [758 P.2d 466, 467 (Utah Ct. App. 1988),] a minor was arrested for unlawfully possessing alcohol when an officer smelled the substance on his breath during a traffic stop. See id. . . . Notwithstanding the absence of alcohol on his person or a failed sobriety test, Sorenson was convicted of illegally possessing alcohol. See id. This court agreed with the trial court's finding "that the mere presence of alcohol on the breath or in the bloodstream does not constitute possession under the statute." Id. at 468. Further, this court remarked in a footnote that such a "position is consistent with well-reasoned decisions from other jurisdictions which have addressed the issue." Id. at 468 n. 2 (citing State v. Lewis, 394 N.W. 2d 212, 217 (Minn. Ct. App. 1986); State v. Hornaday, 713 P.2d 71, 76 (Wash. 1986), (superseded by statute on other grounds).
>
> Other state appellate courts have addressed this issue as well. In State v. Flinchpaugh 659 P.2d 208 (Kan. 1983), the Kansas Supreme Court concluded that "[o]nce a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body. The ability to control the drug is beyond human capabilities." Id. at 211.

State v. Ireland, 106 P.3d 753, 755-56 (Utah Ct. App. 2005) (emphases added).

Additionally, the Minnesota Court of Appeals in State v. Abu-Shanab, 448 N.W.2d 557, 559 (Minn. Ct. App. 1989), concluded that to "'consume,' in the context of alcoholic beverages, means to drink, and that once drunk, alcohol is no longer being consumed." The court specifically rejected the State's contention that consumption of alcohol was a continuing offense. The Michigan appellate court provided this insight:

> Consistent with the dictionary definitions listed above, the commonly accepted meaning of "consume" as it relates to a beverage means to drink or physically ingest the beverage. For example, a person would not say that he is still consuming milk an hour after having it at breakfast because the milk is still digesting in his body. Similarly, a person does not "possess" a beverage once it has been ingested and is digesting. One no longer has control over the beverage as it is digesting.

Rutledge, 645 N.W.2d at 337 (emphasis added).

The ICA decision does not provide guidance as to the parameters of the term "consume." The obvious confusion that existed in this case is likely to reoccur in future cases without guidance from the appellate court. For this reason, I would have accepted the application for certiorari in order to clarify the law.